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ABSTRACT

The effects of drug and alcohol use by pregnant women which concern state policymakers are discussed in this booklet. Topics discussed include: (1) the effects of fetal alcohol syndrome on infants and children, as well as the effects on children of drug use by mothers during pregnancy; (2) initiatives aimed at helping these children; (3) women addicts and alcoholics, including statistics which show that substance abuse during pregnancy appears to cut across racial and socioeconomic lines; (4) initiatives aimed at helping the mother; (5) the relationship of substance abuse and child abuse; (6) state action concerning pregnant women who are suspected of using a controlled substance; (7) foster care or care outside the home of children of drug addicts; (8) state foster care initiatives; (9) the concerns of educators about drug-exposed children in the school systems; (10) miscellaneous state actions and task forces; (11) legal issues; (12) federal actions; and (13) implications to the states of perinatal exposure to drugs and alcohol. Appendix 1 lists relevant sections of statutes of seven states that specifically address alcohol and drug use as they relate to infants. Thirty footnotes and 10 sources consulted are listed. (ABL)

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# EMERGING ISSUES

## Drugs, Alcohol and Pregnancy: Parents and Children At Risk

**A Report of the**

MIDWESTERN LEGISLATIVE CONFERENCE

of the Council of State Governments

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A Report of the
Midwestern Legislative Conference

# Drugs, Alcohol and Pregnancy: Parents and Children At Risk

Prepared by:
Stacie Alexander Fallon

November 1990

EI-28

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In 1988, keen awareness of an emerging health crisis captured the attention of policymakers and their constituents: drug- and alcohol-exposed or addicted babies. Although the crack epidemic has largely been an urban problem, drug and alcohol abuse affect both rural and urban populations in the Midwest. Despite the absence of hard data on women who use harmful substances during pregnancy and on how to reach them during pregnancy, states have responded to the end result of substance abuse during pregnancy -- drug- and alcohol-exposed babies and their addicted mothers. States are developing policies to address social services affected by this national dilemma as well as addressing the longer term consequences of drug and alcohol abuse in the lives of children.

The first drug-exposed infant prevalence study, conducted in 1988, projected that as many as 375,000 babies each year, in rural and urban parts of the country, were exposed in-utero to illegal substances, including crack/cocaine. Since that time other studies have projected only the number of crack/cocaine-exposed babies. (See Break out Box 1)

While the numbers of crack/cocaine babies continue to be debated, there exists a significant problem in this country of women using other damaging substances during pregnancy. These substances include heroine, methadone, amphetamines, PCP, marijuana and excessive alcohol consumption.•

## Impact on Children

Many drug-exposed infants and babies with fetal alcohol syndrome (FAS) are born prematurely. Many weigh less than 5.5 pounds at birth and run an increased risk of physical and mental defects, illness, learning disabilities and behavior problems. Low birth weight accounts for 60 percent of infant deaths. Premature birth is also a factor in infant deaths. While infant deaths for Americans in 1989 (9.7 per 1,000 live births) were down from 9.9 per 1,000 in 1988, the U.S. does not compare well to other industrialized nations in this measure.

Babies with fetal alcohol syndrome physically show the signs of alcohol abuse, including a flattened face and a short nose with a sunken bridge. They also may have joint and limb malformations. Often the babies have central nervous system malformations and heart defects. Other physical problems include curvature of the spine and an overabundance of permanent teeth later in life.

FAS children often do not catch up in growth with unaffected children. Studies suggest that the mean I.Q. of children born with FAS falls between 65 and 80 ( the average is 100). These children often exhibit poor judgment and fail to thrive. The effects of the alcohol follow these FAS children to adulthood. Studies suggest that they never become self-sufficient as adults. They tend to function on the social and intellectual level of a 7- to 9-year-old.

Drug use during pregnancy poses many risks for the fetus. Early signs of a mother's drug use on the infant include tremors related to drug withdrawal, low

• There is some controversy over "a safe amount" of alcohol during pregnancy. This year, the *Journal of the National Institute on Health* published research by University of Iowa scientist and head of the Alcohol and Brain Research Laboratory, James West, who says there is no safe level of alcohol consumption during pregnancy. The report states, "in very subtle ways, low levels of alcohol consumption during gestation may have greater impact on learning capacity in offspring than investigators have thought before." The uncertainty of the amount that may cause damage led the Surgeon General to warn that abstinence from alcohol at the time of conception, during pregnancy and throughout nursing is the only guaranteed safe practice.

birth weight, rigid limbs and an inability to cope with multiple stimuli. Drug-exposed children may have deformities or growth impairments. These infants are at high risk for Sudden Infant Death Syndrome (SIDS), necessitating around the clock monitoring. Mothers who use cocaine in the third trimester place the fetus at high risk for stroke in-utero as well as after birth.

"The financial costs are tremendous. Infants usually stay in the hospital for two to three days. These infants stay for weeks in special care nurseries. Until prevention and education [programs begin], the numbers will continue to climb," said Ira J. Chasnoff, president and co-founder of the National Association for Perinatal Addiction Research and Education (NAPARE).

A two-year study, released in April by NAPARE, found that by 12 months perinatally drug-exposed children catch up in length with drug free children. Their head circumference however, which is considered a marker for risk of long term developmental difficulties, remained smaller at 2 years of age. The drug-exposed toddlers did not score well on tests measuring ability to concentrate, to interact with others and to cope with unstructured environments. They did score within a normal range for cognitive development, indicating that these children are not brain damaged.

With the first wave of children born drug affected reaching school age, little is known about the long term medical and developmental problems these children face. Although no formal studies have been conducted of these children past the age of three, empirical evidence suggests that many are overwhelmed by such stimuli as noise or piles of toys. They often have trouble interpreting nonverbal signals, are frustrated easily, have difficulties concentrating, and have trouble remembering lessons from one day to the next.

Substance-exposed babies face a possible increase of long term damage because their mothers may use any combination of drugs, such as cocaine, marijuana and alcohol during pregnancy. Further complicating matters, these women often do not seek prenatal care.

"A lot come in off the street to deliver their babies never having had prenatal care," said Ms. Lana Renaud, R.N., B.S.N., Northwestern Special Care Nursery.

Given the numerous factors contributing to the problems these children face, no two drug-exposed infants are the same. Each of these factors plays a significant role in how the children of substance abusing mothers are going to be affected. In addition, the timing and amount of substance use by the mother also plays a role.

## Initiatives Aimed at Helping these Children

In Hawaii, a state- and United Way-funded program for pregnant women and their children called Pohai Pono (meaning Circle of Wellness) attempts to reduce the at-risk status of the substance-exposed infant by helping the infants develop strong attachment and self-regulation skills. The program designers feel that strong attachment will aid with emotional and develop-

***Each year, thousands of babies are born potentially facing obstacles or limited life chances because of their mother's drug or excessive alcohol use during pregnancy.***

- In 1988, a study released by the National Association of Perinatal Addiction Research and Education (NAPARE) reported that as many as 375,000 babies, or 11 percent of the infants born each year, in the United States are exposed to harmful substances such as cocaine, heroine, methadone, amphetamines, PCP or marijuana in-utero.
- The President's National Drug Control Strategy estimates that 100,000 babies are born cocaine-exposed each year.
- Doug Besharov, resident scholar at the American Enterprise Institute, estimates that 30,000 to 50,000, or 1 to 2 percent, of live births are exposed to crack.
- Nationally, approximately two of every 1,000 babies are born diagnosed with Fetal Alcohol Syndrome, or approximately 10,000 births annually, according to the March of Dimes. Also the March of Dimes reports that for every baby identified with FAS, as many as 10 others are born significantly affected by alcohol but not showing all the effects characterizing FAS.
- The lack of data on children born both exposed and affected by crack/cocaine each year has led to some debate over the prevalence of the problem. Current studies at the federal, state and local levels should help provide a better understanding of the magnitude of the problem.

mental difficulties the child may experience later.[1]

The average stay in the program is 12 months. In the first year, the program places emphasis on "gaze behaviors, interest, developing a sense of joy and facilitating motor development."[2] For those who stay a second year, the program emphasizes "socialization and guiding the child to develop impulse control and to increase attention span, problem solving, language, motor and creative play skills."[3]

Although the center does not specifically aim for drug-exposed infants and their recovering mothers, the program coordinators have found that in the past two years most of the mothers and their children show a history of drug use and prenatal exposure.[4]

## Women Addicts and Alcoholics

The crack epidemic brought national attention to the crisis of pregnancy and substance abuse. There is, however, little data available on pregnant women substance abusers. Existing studies suggest many are single, often leading chaotic lives, habitual users of illegal drugs, and emotionally distraught individuals using legal psychotropic drugs.[5] The National Institute on Drug Abuse (NIDA) estimates that more than six million women of childbearing age are using illegal substances.

Substance abuse during pregnancy appears to cut across racial and socioeconomic lines. A recent study of pregnant women in Pinellas County, Florida, revealed the following:

- 14.8 percent of pregnant women tested positive for use of alcohol, marijuana, cocaine or opiates.
- The rate of drug use among white women was 15.4 percent and the rate for black women was 14.1 percent.
- Black women's rate of cocaine use was 7.5 percent, while for white women it was 1.8 percent.
- White women used marijuana at a rate of 14.4 percent, compared to black women's rate of 6 percent.
- 16.3 percent of women at public clinics tested positive for substance abuse; similarly 13.1 percent of women in private offices tested positive.
- Black women were reported to health authorities approximately ten times more often than white women, and poor women were also more likely to be reported.[6]

Despite evidence suggesting that proper prenatal care reduces neonatal problems, pregnant addicts face tremendous odds when trying to obtain treatment. Due to liability and the high risk nature of the pregnancies, many residential drug treatment programs will not take pregnant women.

"The problem is that most hospitals won't take these women because of the malpractice. The rate of acceptance of pregnant women in treatment programs might increase if centers were granted immunity from malpractice suits," said William B. Connolly Jr., general counsel for NAPARE and senior partner at Miller, Canfield, Paddock & Stone.

A survey of 78 drug treatment programs in New York City found that 54 percent denied treatment to women claiming to be pregnant and addicted; 67 percent denied treatment to pregnant addicts on Medicaid; 87 percent denied access to pregnant women addicted to crack and on Medicaid. Dr. Wendy Chavkin, a specialist in maternal and child health care, conducted the survey.

Most treatment centers don't provide child care. Many of these women already have children and serve as primary care-givers, leaving the choice of either placing children in foster care in order to be admitted in the residential program or simply not going into treatment.

The length of waiting lists for treatment centers also prohibits timely treatment for these women. When they do get in, the programs are often based on treatment programs for men.

Experts agree that programs for pregnant drug-dependent women must go beyond treating the addiction. Comprehensive programs must address the medical and prenatal needs of the mother, the pediatric needs of the child, and the psychological and developmental needs of both. Teaching parenting skills, offering job training and providing child care are also critical.

## Initiatives Aimed at Helping the Mother

Among the programs developed during the past several years to serve addicted mothers:

- In 1989, the Oregon legislature appropriated $938,000 to provide alcohol and drug treatment to women with children 8 years and under.[7]

- In 1988, the governor of Pennsylvania announced the creation of a $1 million statewide network of substance

abuse treatment centers for addicted women and small children, plans for a $300,000 facility to treat addicted Philadelphia mothers who have abused or neglected their children, and a $3.5 million project to convert a Philadelphia foundry into a showcase treatment facility for 125 hard-core addicted mothers and their children.[8]

• The Eleanore Hutzel Recovery Center serves adult women from Detroit and the surrounding area. The average age is 26 to 27, and most use more than one drug. The facility has the capacity to handle about 20 children on a daily basis. The program receives 76 percent of its $1.7 million annual budget from the state of Michigan. The center has a staff of 45 clinical professionals, including physicians, nurses, social workers and therapists.

• The Pohai Pono program in Hawaii offers fairly comprehensive services not only to the infants, but also to their addicted/recovering mother. Although the program serves at-risk families, most of the families include a single mother with sole responsibility for the child. In addition to recovering from chemical dependence, most of the women also suffer from an underlying psychiatric disorder. The staff has found that most also have a history of early traumatic loss and violence. The program designs comprehensive, individual treatment plans for these women. All participants are referred either to Alcoholics Anonymous or Narcotics Anonymous. Also the women are enrolled in a vocational program and the children in appropriate day care or preschool center.[9]

• In Miami, the Family Health Center is a comprehensive treatment community for female substance abusers and their children. The program receives funding from the U.S. Department of Health and Human Services and the Florida Department of Health and Rehabilitative Services. In addition to receiving primary care and addiction services, the participants receive "vocational training, tutoring for a high school equivalency diploma, parenting and nutrition courses, psychological counseling, AIDS prevention training, transitional housing, child care and health care."[10] The women also attend Narcotics and Alcoholics Anonymous meetings. To graduate from the program, a woman must be employed for 90 days, save $500, have facility-approved housing and be working toward her high school diploma. She continues in the program as an outpatient and is randomly tested for drugs.

## The Family

Substance abuse seems to be playing a major role in child abuse and neglect reports. However, although chemical dependency and abuse are often found together, experts caution that causal relationship has not been established.[11] Still, parental drug addiction clearly causes children to suffer a great deal.[12] The 1988 Annual Fifty Survey by the National Committee for the Prevention of Child Abuse and Neglect found that states reported that substance abuse was involved in 68 percent of the cases.

States have moved to ensure that infants born substance affected are not sent home with parents who are unable to care for them by including in the definition of abuse or neglect perinatal drug exposure or fetal alcohol syndrome. Many states now require that a thorough evaluation be conducted before a child is sent home.

## State Action

In July 1989, Minnesota passed the first bill allowing the state to intervene during a woman's pregnancy. The law requires health care practitioners to file neglect reports with the local welfare agency if they suspect the pregnant woman has used a controlled substance for nonmedical purposes during her pregnancy. The legislation also allows for voluntary reporting by *any person* who has reason to believe a pregnant woman used a controlled substance for nonmedical purposes during pregnancy. (Please see Appendix 1 for the full text of the Minnesota reporting law and the civil prosecution law, as well as a comprehensive list of state statutes mentioning drugs or alcohol in the definition of neglect in reporting and civil prosecution law.)

Recognizing the difficulty of determining what amount of alcohol consumption is safe, the Minnesota legislature chose not to include alcohol in its statute requiring physicians to report substance abuse. Instead, a provision is included in the statute that requires state schools to teach students about the risk of alcohol consumption during pregnancy.[13]

Illinois has included the use of a controlled substance in its definition of neglect. (Relevant sections are included in Appendix 1.)

Indiana now identifies FAS and addiction in its statute identifying children in need of services. (Relevant sections are included in Appendix 1.)

## Foster Care or Care Outside the Home

The children of drug addicts face an uncertain future if their mother or father has a substance abuse problem and does not receive proper treatment. Often it is necessary to remove the child from the home to prevent their lives from further devastation due to drug or alcohol abuse.

The foster care system has been overwhelmed by the children and infants of substance abusers. The number of children in substitute care nationwide increased by nearly one-third, from 280,000 in 1986 to 360,000 in 1989, according to the American Public Welfare Association.

In the absence of accurate information, experts in child welfare have called for both national and state by state studies to determine the actual number of children and infants whose lives have been impacted by the drug problem.

The foster care system is struggling to keep up with the special needs of drug-exposed children who also run the risk of testing HIV positive. Not only must the foster care system recruit foster parents for this population, it must also provide special training to these parents to help them care for the infants.

These burgeoning numbers and the widespread fear that the number of children will continue to increase as drugs take firm hold on families has left policymakers, most notably William Bennett, director of the Office of National Drug Control Policy, wondering if orphanages and group homes are a viable alternative. Child welfare professionals are divided over the prospect of such facilities. Despite the controversy, congregate care facilities are beginning to spring up across the country out of necessity to help relieve crowded foster homes and shelters and overstays in hospitals.

If the older children of addicts are not adoptable, group homes will be the only alternative to the overwhelmed foster care system. "The silent problem is the older children in care of addicts. We're going to have a series of moral dilemmas with these [children] because their parents don't care, feed, teach or supervise them, and they're going to be older and the public will be less sympathetic [than with the more adoptable infants]," said Doug Besharov, resident scholar, American Enterprise Institute.[14]

This concern led Sandra Feldman, president of New York City's local United Federation of Teachers, to propose rural public boarding schools to take older children, including wards of the state and children whose parents want them out of the drug environment.[15]

Beyond the big cities, rural communities share similar concerns. South Dakota faces a big problem with drug and alcohol abuse on seven reservations. Most (68 percent) of the children placed in foster care are Native Americans and have been placed there because of child abuse and alcohol abuse by their parents on the reservations.[16]

The foster care system is not the only support system overwhelmed by drug-exposed infants, especially crack addicts. Members of the addict's family, especially the addict's mother, are now serving as "mother" to these infants.

In Washington, D.C., a social service center called Community of Hope has begun to address some of the special needs of these grandmothers. These women face a set of unique problems. Often they do not have legal custody of the children so they do not qualify for public assistance. Nor are these women eligible for the amount that foster parents receive each month to care for their children. Community of Hope keeps the women informed about available resources and helps them through the bureaucratic process to get that help. The group also helps these women cope emotionally as they deal with becoming parents to infants and toddlers as well as coping with having an addicted daughter.[17]

## State Foster Care Initiatives

In response to the need for accurate information on the number of children affected by alcohol and drug abuse, the Department of Human Services in North Dakota recently put into place a data system that allows them to identify the factors causing dysfunction within the families to help them respond to the needs of children being affected by substance abuse.[18]

In California, Gov. Deukmejian authorized $8 million to fund five pilot projects for three years. One of the projects, funded with $1.2 million provided to the Department of Social Services, recruits and trains specialized foster care families for drug- and alcohol-exposed infants as well as HIV positive infants. Respite care for the pilot project foster families is also funded. The enabling legislation (AB 2268) provides statutory authority to place medically fragile children in foster

care. Another piece of legislation, SB 1173, provides for respite care and for future expansion of the pilot projects.[19]

## Education

Educators across the country have begun to express concern over drug-exposed children coming into the school system. Judy Howard, clinical professor of pediatrics at the UCLA School of Medicine, predicts that, within a few years, 40-60 percent of the children in some inner-city schools will have been prenatally exposed to drugs.

"We do not know what the long term effects are. A Berkeley professor came out with a report that was highly optimistic about these children. But nobody knows the long term effects of the drugs. There hasn't been time to know the impact. Cocaine and crack are such new phenomena, there has been no time to follow the children," said Pat O'Keefe, communications director of NAPARE.

The Salvin Special Education Center in Los Angeles, a pilot program for drug-exposed children, provides some insight into what educators might expect when these children reach school age. Although the symptoms of the mother's drug use vary from child to child, the mother's problems are compounded by a difficult, chaotic and unstable home life.

The California educators have found that the children tend to be overwhelmed by stimuli, find interpreting nonverbal signals difficult, are easily frustrated, have difficulty concentrating and forget lessons from one day to the next.[20] The teachers have also found that, since abrupt changes in activities upset the children, advance warnings of changes, either through words or music, helps.

The Salvin teachers stay with the children for more than one year to help them learn to trust adults. The teachers also work with psychologists, doctors, social workers and the parents.

Such intensive education doesn't come cheap. In Los Angeles, it costs $3,500 a year to educate a child in a regular classroom, $9,000 in a special education classroom and $15,000 for the children in the pilot project.[21]

There is some debate over whether these children will need special education or if they can be mainstreamed into the school system. Experts hope that with proper nurturing many of these children will overcome the difficulties before they enter the school system.

In the last few years, Head Start programs around the country have reported an increase in the number of dysfunctional families that they serve, especially families with drug abuse problems. Some Head Start programs have teamed with mental health agencies and child welfare agencies to create model programs to address the problems associated with dysfunctional families.

## Miscellaneous State Actions and Task Forces

In October 1989, under Executive Order 89-76, the Ohio Task Force on Drug-Exposed Infants was created to examine the problems of substance abuse babies and to make recommendations.

By May 1990, the Task Force made the following recommendations:

- No mandatory reporting of pregnant women for use of illegal drugs should be required;
- Appropriate treatment and recovery programs must be assured for all pregnant women and for women of childbearing age, with provisions for their children, regardless of income;
- The state should undertake a general foster parent and adoptive parent recruitment campaign;
- The key to the primary prevention of substance abuse is a comprehensive education program in both traditional and non-traditional settings, in the community, and among professionals at all intervention points;
- A comprehensive resource center should be physically established and fully functional. It should be kept current;
- Beginning with state fiscal year 1993, the state of Ohio should document, over several consecutive years, the number of women of childbearing age, mothers, infants and children who are affected by substance abuse;
- Interagency coordinating committees should be established at both the state and community levels. State agencies should support local solutions to the problem of drug-exposed infants;
- State funding should be made available to researchers to permit longitudinal studies to improve knowledge of drug use and the resulting health problems for infants, children and pregnant women. The research should also establish the most effective models for prevention, treatment and recovery;

• State and local agencies should adapt their existing rules and policies to implement the recommendations of the Task Force.

In Illinois, addressing the needs for interagency coordination to ensure that drug affected families receive the services available to them, an innovative joint effort between the Illinois Department of Children and Family Services, the Illinois Department of Alcoholism and Substance Abuse and NAPARE was created to develop an education, prevention, referral and coordinated intervention strategy. Since its inception in 1986, the model had provided integrated medical, substance-abuse and social work services to more than 400 mothers and infants.[22]

In Washington, the legislature moved toward a system of prevention and education for pregnant women with a bill (SB 6458) that recognized drug addiction as well as the use of controlled substances and alcohol during pregnancy as constituting a medical emergency. In the bill, the legislature acknowledged "that there are currently no clear methods or strategies that are proven effective for preventing such use. Therefore, the legislature intends to help the pregnant women protect themselves and their resulting infants from substance abuse and its effects by promoting the establishment of local programs to develop replicable, locally based prevention strategies to forestall exposure and provide the earliest possible intervention and treatment to benefit both the mothers and their resulting infants."

The legislation calls for the secretary of health to develop and promote statewide public health and education strategies designed to prevent and address the problems associated with using controlled substances and alcohol during and immediately after pregnancy.

In Colorado, the Department of Social Services, the Denver Department of Health and Hospitals and the Piton Foundation Project on Persistent Poverty recently co-sponsored *A Working Conference on the Community Response to Drug-Exposed Infants*. The conference brought together 85 participants from fields as diverse as medicine, law, social work and public policy to develop recommendations for the state on how to respond to the needs of pregnant and postpartum substance abusers and their children.[23]

## Legal Issues

A number of complex legal issues surround substance abuse during pregnancy. Although no state has passed legislation specifically focused on criminal sanctions for certain prenatal conduct such as drug use, there are approximately 20 fetal endangerment cases pending across the country.

Prosecutors have begun to use existing child abuse and drug laws to prosecute women for prenatal conduct. "Massachusetts has a statute saying it's a crime to transmit drugs. Every legislator voted for that. No one dreamed it would be applied to women taking drugs while pregnant," said Alan Dershowitz, law professor at Harvard University.[24]

In the first case of its kind, a Wyoming woman, in her fifth month of pregnancy, was charged with felony child abuse due to her excessive alcohol consumption during pregnancy. The charge was dismissed in January because the court found that it was impossible to determine if the child had sustained any injury before birth. This marked the first time a woman was charged for her prenatal alcohol consumption *before* the child was born.[25]

In July of 1989, Jennifer Johnson was found guilty of two felony counts of delivering a drug to a minor by a Seminole County, Florida judge. The judge concluded that Johnson had delivered the drug to her two children at birth through the umbilical cord. The court ruled that she had passed cocaine to her children in the period just after birth when they were physically separate from the mother -- therefore a person in the court's view -- yet still attached to the umbilical cord.

Such prosecution raises some question of whether these women are being denied their due process rights. "The existing drug laws, specifically the laws against distribution, do not appear to apply to prenatal drug use. Therefore, women are not being given fair warning that their actions may be considered illegal because they were pregnant at the time," said Alison B. Marshall.[26]

In February 1987, a Los Angeles Municipal Court judge ruled that Pamela Rae Stewart had not committed a crime although she had been charged with criminal neglect of her fetus for failing to follow medical advice. Stewart was a cocaine addict at the time. Her son was born brain damaged and died within a few weeks of delivery. "The court held that the statute under which Stewart had been charged did not apply to the situation in issue. The ruling judge stated, however, that he believed the state legislature, to protect the health of the fetuses, "could, under certain narrowly

defined circumstances, restrict the actions of pregnant women," said Connolly and Marshall.[27]

At the heart of the debate surrounding the prosecution of pregnant women for certain prenatal conduct is whether the fetus has rights and if those rights supersede the rights of the mother.

In *Roe v. Wade*, the Supreme Court held that "the word 'person' as used in the Fourteenth Amendment does not include the unborn." While concluding the fetus is not a person, the Court held that the states have an "important and legitimate interest in protecting the potentiality of human life."

In *Webster v. Reproductive Health Services, Inc.*, Judge Rehnquist, writing for the plurality, concluded that "we do not see why the State's interest in protecting potential life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing State regulation after viability but prohibiting it before viability."

Some have argued that substance abuse during pregnancy has become a surrogate for the abortion debate. However, others feel that at issue is not if a woman has the right to terminate her pregnancy. Rather, the question is if a woman -- having decided to carry to term -- can be forced to refrain from behavior potentially harmful to her fetus.

Many scholars believe that the fetus has rights once the woman chooses to carry the baby to term, and included in those rights is the right to a healthy life. However, Bonnie Steinbock, University of Albany professor, states that "once a woman decides to have a baby she has a moral obligation to be reasonable in her behavior. But that's still on the moral level. To translate it to a legal level brings a new dimension."[28]

Legislation making certain prenatal conduct subject to criminal prosecution may infringe on the mother's right to privacy. "Courts have held in a variety of situations that the common law recognized that an individual has the right to govern his or her body and to be free from nonconsensual invasions of bodily integrity," said Connolly and Marshall.[29]

Punitive legislation also raises equal protection concerns. "Prosecution [occurs more often] with low income black women than white women. Prosecutors are looking for underrepresented defendants. Middle class doctors do not report white women. They are afraid if they report very affluent white women they would get sued for invasion of privacy and defamation of character. White women have been prosecuted but the poor and minority women are overrepresented," said Connolly.

"You can find examples of women criminally prosecuted and because of prosecution they are forced into drug rehabilitation. So prosecutors are [doing this] as a way to help the women. But there are not enough drug rehab programs," said Connolly.

In its first policy statement, NAPARE stressed that "those who advocate criminalization also frequently ignore the fact that by criminally prosecuting women who have used drugs during pregnancy, the state is punishing women who are themselves victims -- victims of their addictions. As the U.S. Supreme Court (*Lindar v. United States*, 268 U.S. 5, 1925) recognized more than sixty years ago, drug addiction is a medical not a criminal matter."

## Federal Actions

The following pieces of legislation are pending in Congress.[30]

- HR 4847 (Rep. Thomas Bliley Jr.) would amend the Public Health Service Act to require states to establish procedures for testing and treating newborns when there is reason to suspect that the infant may be suffering from substance abuse and related physical drug dependency, FAS or other congenital conditions.

- S. 2505 (Sen. Pete Wilson), the "Substance Abuse During Pregnancy Act of 1990." would focus on providing grants to improve identification and treatment of substance abuse by pregnant and post partum women. Additional legislation pending. introduced by Senator Wilson, S. 1444, would require states to prosecute women who use drugs during pregnancy.

- S. 2559 (Sen. Herbert Kohl), the "Comprehensive Assistance to Substance Abusing Families Act of 1990," would provide prevention and alcohol and drug treatment for pregnant and post partum women, fund public education programs about the dangers of alcohol and drug use during pregnancy, expand Medicaid coverage for drug and alcohol treatment programs for women of child bearing years, and expand WIC to include residential alcohol and drug treatment programs serving women and children.

- S. 2649 (Sen. Ted Kennedy), the "Drug Abuse Treatment and Prevention Improvement Act of 1990",

an aspect of the bill would provide funding for improved and expanded projects for reducing the incidence of alcohol and drug abuse among pregnant and post partum women and their infants.

## Implications for the States

As more data on the problem of perinatal exposure to drugs and alcohol becomes available, states will have better policy making tools to address the needs of the women and children most likely to be affected by substance abuse. States will continue on the current path of ensuring that infants do not go home with parents who are unable to care for them and of trying to expand residential treatment programs available both to women and their children.

In the near future, states will have to contend with the first wave of these children entering school systems that are unprepared to meet their needs. The experience of the Salvin School in Los Angeles provides some insight into what to expect but it also suggests that the home life of these children is an important area to address.

The states will need to consider programs that focus both on treating the substance abuse problem within the family as well as teaching basic parenting skills.

In response to the need for a safe alternative for children whose addicted parents are not amenable to treatment, the Inspector General has called for the states to reduce barriers to placing drug-exposed infants in foster care and adoptive homes. This could include

***In 1986, the Department of Health and Human Services compiled the infant mortality rates for the 35 countries with the lowest rates of deaths in the first year of life for every 1,000 live births. The department also included, for comparison, the deaths for black Americans, for white Americans, and for all Americans.***

1. Japan 5.2
2. Finland 5.9
3. Sweden 5.9
4. Switzerland 6.8
5. Hong Kong 7.7
6. Netherlands 7.8
7. Canada 7.9
8. Norway 8.0
9. France 8.0
10. Denmark 8.2
11. West Germany 8.5
12. Spain 8.5
13. Ireland 8.7

-- United States (White) 8.9

14. Australia 8.9
15. Scotland 8.9
16. East Germany 9.2
17. Singapore 9.3
18. England and Wales 9.6
19. Italy 9.8
20. Northern Ireland 10.2
21. Austria 10.3
22. United States 10.4
23. New Zealand 11.4
24. Israel 11.4
25. Greece 12.3
26. Czechoslovakia 13.4
27. Cuba 13.6
28. Bulgaria 14.7
29. Kuwait 15.7
30. Portugal 15.9
31. Belgium 16.1
32. Poland 17.5
33. Costa Rica 17.8

-- United States (Black) 18.0

34. Hungary 19.1
35. Chile 19.1

reviewing and revising existing laws and policies on termination of parental rights and interracial placement. Also courts should establish "fast track" procedures to expedite child welfare cases involving drug abuse.

States thus far have had to respond to the immediate needs of the women and their children. Now they are beginning to look toward prevention and education as the means to a long term solution to the crisis. As more is learned about women at risk for using drugs during pregnancy, outreach programs can help ensure that these women receive prenatal care and are treated for their addiction. Education programs, such as the Washington initiative, will provide information to the other states on what works and what does not work. Clearly the states will have to exchange timely and accurate information on this problem.

## Appendix 1

The American Bar Association Center on Children and the Law recently released a comprehensive list of state statutes that include drug and alcohol use in the definition of neglect and abuse. Listed below are relevant sections of state statutes that specifically address alcohol and drug use as they relate to infants.

### *Florida Reporting Law*

Fla. Stat. Ann. 415.503 (Supp. 1988)

(3) "Child abuse or neglect" means harm or threatened harm to a child's physical or mental health or welfare by the acts or omission of the parent or other person responsible for the child's welfare.

(7) "Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare (a) inflicts, or allows to be inflicted upon the child physical or mental injury. Such injury includes, but is not limited to:...

(2) Physical dependency of a newborn infant upon any drug controlled in Schedule I of 893.03, or upon any drug controlled in Schedule II 893.03, with the exception of drugs administered in conjunction with a detoxification program as defined in 397.021, or drugs administered in conjunction with medically-approved treatment procedures; provided that no parent of such a newborn infant shall be subject to criminal investigation solely on the basis of such infant's drug dependency;

### *Illinois Civil Prosecution Law Illinois Ann. Stat. ch. 37, 802-3 (1)*

(1) Those who are neglected include

(c) any newborn infant whose blood and urine contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, as now or hereafter amended, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of such substances, the presence of which in the newborn infant is the result of medical treatment administered to the mother of the newborn infant.

### *Indiana Civil Prosecution Law Ind. Code Ann. 31-6-4-3.1 (Burns 1987)*

A child is a child in need of services if: (1) the child is born with fetal alcohol syndrome or an addiction to a controlled substance or a legend drug; or (2) the child:

(C) is at a substantial risk of a life threatening condition that arises or is substantially aggravated because the child's mother was addicted to alcohol, a controlled substance, or a legend drug during pregnancy; and needs care, treatment, or rehabilitation that the child is not receiving, or that is unlikely to be provided or accepted without coercive intervention of the court.

### *Massachusetts Reporting Law*

Mass. Gen. Laws Ann. ch.119, 51A (West Supp. 1988)

... have reasonable cause to believe that a child... is suffering serious physical or emotional injury result from abuse inflicted upon him including sexual abuse, or from neglect, including malnutrition, or who is determined to be physically dependent upon an addictive drug at birth...

### *Minnesota Reporting Law*

Omnibus Crime Bill, Chapter No. 290, H.F. No.59

Minnesota Statutes 1988 at 626.5561; and .5562

Section 5. (Reporting of Prenatal Exposure to Controlled Substances) [626.5561]

Subdivision 1. [reports required.] A person mandated to report under section 626.556, sub division 3, shall immediately report to the local welfare agency if the person knows or has reason to believe that a woman is pregnant and has used a controlled substance for a nonmedical purpose during pregnancy. Any person may

make a voluntary report if the person knows or has reason to believe that a women is pregnant and has used a controlled substance for a nonmedical purpose during the pregnancy.

Subdivision 2. If the report alleges a pregnant woman's use of a controlled substance for a nonmedical purpose, the local welfare agency shall immediately conduct an appropriate assessment and offer services indicated under the circumstances. Services offered may include, but are not limited to, a referral for chemical dependency treatment if recommended, and a referral for prenatal care. The local welfare agency may also take any appropriate action under chapter 253B, including seeking an emergency admission under section 253B.05 if the pregnant women refuses recommended voluntary services or fails the recommended treatment.

Section 6. (Toxicology Tests Required) [626.5562]

Subdivision 1 [test; report] A physician shall administer a toxicology test to a pregnant woman under the physician's care to determine whether there is evidence that she has ingested a controlled substance, if the woman has obstetrical complications that are a medical indication of possible use of a controlled substance for a nonmedical purpose. If the test results are positive, the physician shall report the results under section 5. A negative result does not eliminate the obligation to report under section 5, if other evidence gives the physician reason to believe the patient has used a controlled substance for nonmedical purposes.

Subdivision 2. [newborns] A physician shall administer to each newborn infant born under the physician's care a toxicology test to determine whether there is evidence of prenatal exposure to a controlled substance, if the physician has reason to believe based on a medical assessment of the mother or the infant that the mother used a controlled substance for a nonmedical purpose prior to the birth. If the test results are positive, the physician shall report the results as neglect under section 626.556. A negative test result does not eliminate the obligation to report under section 626.556 if other medical evidence of prenatal exposure to a controlled substance is present.

***Minnesota Civil Prosecution Law***

Omnibus Crime Bill, Chapter No.290, H.F. No.59 Minnesota Statutes 1988 at 626.556 Section 4 Subdivision 2 (Definitions). "Neglect" includes prenatal exposure to controlled substance, as defined in section 5, used by the mother for a nonmedical purpose

***Oklahoma Reporting Law***

Okla. Stat. Ann. tit.21, 846 (Supp.1989)

A. Every physician or surgeon, including doctors of medicine, licensed osteopathic physicians, residents and interns, or any other health care professional attending the birth of a child who appears to be a child born in a condition of dependence on a controlled dangerous substance shall promptly report the matter to the county in which such birth occurred. Provided it shall be a misdemeanor for any person to knowingly and willfully fail to promptly report any incidence as provided above. If the report is not made in writing in the first instance, it shall be reduced to writing by the maker thereof as soon as may be after it is initially made by telephone or otherwise and shall contain the names and addresses of the child and his or her parents or other persons responsible for his injuries, including any evidence of previous injuries, the nature and extent of the child's dependence on a controlled dangerous substance and any other information that the maker of the report believes might be helpful in establishing the cause of the injuries and the identity of the person or persons responsible therefore if such information or any part thereof is known to the person making the report.

***Oklahoma Civil Prosecution Law***

Okla. Stat.. Ann. tit. 10, 1101 (4) (Supp.1989)

"Deprived child" means a child who is for any reason destitute, homeless, or abandoned or who does not have the proper parental care or guardianship or whose home is an unfit place for the child by reason of neglect, cruelty or depravity on the part of his parents, legal guardian, or other person in whose care the child may be, or who is a child in need of special care and treatment because of his physical or mental condition including a child born in a condition of dependence on a controlled dangerous substance, and his parents, legal guardian, or other custodian is unable to or willfully fails to provide said special care and treatment...

***Utah Reporting Law Receiving Agency***

Utah Code Ann. 78-3b-8 (1), (6) (1987)

(1) The division [family services within the department of social services] shall make a thorough investigation upon receiving either an oral or written report of alleged abuse, neglect, fetal alcohol syndrome, or dependency, when there is reasonable cause to suspect a situation of abuse, neglect, fetal alcohol syndrome, or dependency. The primary purpose of the investigation shall be the protection of the child.

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